Nos. 87-710, 87-735

In the Supreme Court of the United States
October Term, 1987

CATHERINE O. SWAN, et al.,
Petitioners,

v:

ALAN MILES RUBEN, et al.,
Respondents

WARREN CITY SCHOOL DISTRICT BOARD OF EDUCATION, et al.

v.

ALAN MILES RUBEN, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

RESPONDENT RATHBUN'S BRIEF IN OPPOSITION

Libert Pinto, Esq.
Suite 2222
The Illuminating Building
55 Public Square
Cleveland, Ohio 44113
Counsel for Respondent Rathbun
February 15, 1988

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether the reversal of a trial judge's award of attorney fees against an unsuccessful Title VII plaintiff on the ground of abuse of discretion presents an important question worthy of review when the error allegedly committed by the Court of Appeals involves only an asserted factual misapplication of this Court's Roadway Express and Christiansburg Garment Co. standards?

2. Whether Petitioner Board of Education has waived its right to seek review of the reversal of a trial judge's award of attorneys fees against an unsuccessful Title VII plaintiff when its petition relies solely upon 28 U.S.C. §1927 as a basis for plaintiff's liability and this provision applies only to attorneys?

3. Whether the individual Board of Education member Petitioners, who were sued only in their official, representative capacities, have independent standing to seek review?

4. Whether the Court of Appeals made an appropriate factual application of the "bad faith" standard for an award of attorney fees set forth in this Court's Roadway Express decision?

5. Whether the Court below made an appropriate factual application of the objective test of non-frivolousness adopted by this Court in its Christiansburg Garment Co. decision?

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BRIEF IN OPPOSITION FOR RESPONDENT RATHBUN

Respondent Jeanne Rathbun respectfully requests that this Court deny the petitions for certiorari filed by petitioners Warren City School District Board of Education, et al., and Catherine O. Swan, et al., to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

COUNTER-STATEMENT OF THE CASE

This case does not present any issue, constitutional or otherwise, deserving review. Instead, it involves a mere factual issue, peculiar to this particular litigation, whether the trial judge abused his discretion by awarding counsel fees to defendants in a Title VII action.

Jeanne Rathbun is a female naturalized citizen of the United States who was employed by petitioner Warren City School District Board of Education (hereinafter

"Board of Education") as a janitor at all times relevant herein. During her employment she was repeatedly referred to as "French bitch" and was allegedly told by a male co-worker, "French bitch ... all they're good for is to fuck men and give syphilis to men". There was trial testimony that she made this verbal abuse known to her superiors and the school board (App. 16).* Respondent Rathbun was the victim of one violent attack (App. 67) and allegedly the victim of a second violent attack by male co-workers (App.16). The job-site harassment of the plaintiff was so severe that an investigation by the Federal Bureau of Investigation was conducted (App.68). In addition, Rathbun alleged that she was denied equal overtime

*References to "App." are to the identical appendices to the Petitions for Writ of Certiorari filed herein.

opportunities and subjected to disparate workloads and a retaliatory transfer. (App.2). Both courts below found that "Rathbun's superiors considered certain work that she was capable of doing "man's work". (App. 16, 66). "[N]either did the the basis for her case rest entirely on her own testimony." (App. 16).

Respondent Rathbun filed charges of discrimination with the Ohio Civil Rights Commission ("OCRC") in September, 1978 and the Equal Employment Opportunity Commission in October, 1978. In March 1979, the OCRC, on the basis of Findings of Fact, a four page Summary of the Evidence, and a voluminous Index of Attachments which included numerous witness statements from Rathbun's co-workers, found probable cause that petitioner Board of Education had engaged in unlawful discrimination.

(App. 3). In July 1980 the EEOC issued a right-to-sue letter to Rathbun. (App.3).

On October 16, 1980, attorneys Shenyey, Berman and Abakumov timely filed a Complaint on behalf of respondent Rathbun in the United States District Court for the Northern District of Ohio alleging violations of 42 U.S.C. §2000e, et seq.. Petitioner Board of Education[1] and the Petitioner members of the Board of Education, Catherine O. Swan, et al., (hereinafter "Board Members") were named as Defendants. Petitioner Board Members were sued solely in their official representative capacities (App.4, 16 n.6). In 1981 Shenyey, Berman and Abakumov with-

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[1]Also named as Defendants were employees of the Board of Education but neither court below and neither Petition for Writ of Certiorari attached significance to this fact.

drew as counsel for Rathbun for reasons unrelated to the merits of her case and she was thereafter represented by Elliott Lester. Respondent Alan Miles Ruben appeared for Rathbun as "additional counsel" several months later. (App.4).

Two Motions to Dismiss and two Motions for Summary Judgment filed on behalf of Defendant were denied prior to the commencement of trial (App. 22-23).[2] On June 29, 1984, following four days of trial, the district judge dismissed the action pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. On

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[2]A Motion for Summary Judgment was granted as to Defendants Pegues and Berarducci but this is not relevant herein for the reason noted by the Court of Appeals (App. 23 n.8).

July 6, 1984, Findings of Fact and Conclusions of Law, containing no suggestion that Rathbun's action was frivolous or filed or prosecuted in bad faith, were filed. The Order of Dismissal was filed July 10, 1984.

On October 30, 1984, Petitioner Board Members who had been sued only in their official, representative capacities, filed a Motion for Attorney Fees. Petitioner Board of Education filed its Motion for Attorney Fees on January 9, 1985 (App.5). On October 22, 1985 the district judge entered an Order and Opinion granting both Motions for Attorney Fees in their entirety, (App. 5), despite the fact that no Affidavit supporting an Attorney Fee Motion was ever filed by counsel for Petitioner Board of Education (App. 29 n.15). The total amount of

attorney fees ordered to be paid by respondent Rathbun was $36,159.21. (App.6).

"[T]he district judge did not clearly delineate the legal grounds for sanctioning Rathbun...." (App.6). The district judge did refer to 28 U.S.C. §1927, 42 U.S.C. §2000e-5(k) and the court's inherent powers. It is clear, however, that the district judge awarded petitioners all of their legal fees from the very inception of the action. (App. 57-58). Explicitly finding that the applicable standard of review was that of abuse of discretion, (App.14-15), the United States Court of Appeals for the Sixth Circuit reversed and remanded for reconsideration of Rathbun's liability for

defendants' costs.[3]

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[3]Petitioners have not included in the appendices any Order imposing costs on respondent Rathbun for the simple reason that no such Order exists.

REASONS FOR DENYING THE WRIT

I. PETITIONERS SWAN, ET AL., WHO WERE SUED ONLY IN THEIR OFFICIAL CAPACITIES, HAVE NO STANDING TO PURSUE THIS LITIGATION.

In Bender v. Williamsport Area District, __U.S.__, 106 S.Ct. 1326, 1332 (1986), this Court held:

> [A] Member of the School Board sued in his official capacity... has no personal stake in the outcome of the litigation and therefore did not have standing to file the notice of appeal.

In this case the Board Member petitioners were sued only in their official representative capacities as members of the petitioner Board of Education (App.4, 16,n.6). Thus, the lawsuit in reality was "not a suit against the official[s] personally, for the real party in interest is the entity." Kentucky v. Graham, 473 U.S. 159, 167,n.14, (1985), (emphasis in original). See also

Monell v. New York City Dept. of Social Services, 436 U.S. 658,690 n.55 (1978). Thus, the clearly erroneous award of attorney fees to the Board Member petitioners in their individual capacities by the district court (App.16, n.6) was void for want of jurisdiction and the Board Member petitioners lack standing in their individual capacities to pursue the instant petition.

II. 28 U.S.C. §1927 ONLY APPLIES TO ATTORNEYS AND THE PETITIONER BOARD OF EDUCATION HAS WAIVED ANY OTHER ARGUMENT SUPPORTING LIABILITY OF RESPONDENT RATHBUN

28 U.S.C. §1927 is captioned "Counsel's liability for excessive costs" and explicitly provides for the imposition of an attorney fee award only on an "attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof." Respondent Rathbun is not an attorney and did not act as counsel in the instant litigation; instead she was a janitor plaintiff in the underlying Title VII action. Every court which has considered the issue has found, consistently with the express statutory language, that only an attorney can be sanctioned under 28 U.S.C. §1927. See, e.g., Oliveri v. Thompson, 803 F.2d 1265, 1273 (2d Cir. 1986); FTC v.

Alaska Land Leasing, Inc., 799 F.2d 507, 510 (9th Cir. 1986) cert. denied, 107 S.Ct. 1373 (1986); 1507 Corp. v. Henderson, 447 F.2d 540, 542 (7th Cir. 1971). No award against respondent Rathbun could be properly based on 28 U.S.C. §1927.

Petitioner Board of Education devotes its entire "Why the Writ Should be Granted" section of its petition to a discussion of 28 U.S.C. §1927 and mentions no other basis for the district court fee order against respondent Rathbun. Thus any other basis has been waived by petitioner Board of Education. Southeastern Express Co. v. Robertson, 264 U.S. 541, 542 (1924).

III. THE COURT BELOW PROPERLY APPLIED THE "BAD FAITH" STANDARD ADOPTED IN ROADWAY EXPRESS, INC. V. PIPER

The Court of Appeals for the Sixth Circuit correctly stated the "bad faith" standard for an award of attorney fees set forth in Roadway Express, Inc. v. Piper, 447 U.S. 752, 766-67 (1980). (App.10). The argument of petitioner Board Members is simply that the Court of Appeals misapplied this Court's standard to the particular facts of this case. Such an issue of factual application does not merit review by this Court.

The Court of Appeals correctly applied the Roadway Express "bad faith" test in this case. The district judge, in awarding attorney fee sanctions against respondent Rathbun, "did not even consider the fact that the OCRC had issued a probable cause finding against the school

board...." (App. 16). The Court of Appeals gave proper weight to the "probable cause" finding. No Court has ever imposed sanctions on the ground that a Title VII action was frivolous or filed in "bad faith" following an administrative determination of probable cause. See, e.g., Badillo v. Central Steel & Wire Co., 717 F.2d 1160 (7th Cir. 1983); Bowers v. Kraft Foods Corp. 606 F.2d 816 (8th Cir. 1979); Mitchell v. Office of Los Angeles County Sup't of Schools, 805 F. 2d 844 (9th Cir. 1986); EEOC v. Freuhauf Corp., 609 F.2d 434 (10th Cir. 1979).

The petitioner Board Members were sued only in their representative capacities (App. 16n.6). Thus, the probable cause finding against the Board of Education was in fact a finding against the Board Members in their official

capacities. Cf. Kentucky v. Graham, 473 U.S. 159, 167n.14 (1985); Monell v. New York City Dep't of Social Services, 436 U.S. 658,690 n.55 (1978).

The Court of Appeals was also correct that the favorable rulings for respondent Rathbun on defendants' two Motions for Summary Judgment and two Motions to Dismiss strongly rebut any findings of bad faith by respondent. See, e.g., Jones v. Continental Corp., 789 F. 2d 1225,1231 n.4 (6th Cir. 1986); Ford v. Temple Hospital, 790 F.2d 342,349 (3rd Cir. 1988); Browning Debenture Holders Committee v. DASA Corp., 560 F.2d 1078, 1088 (2d Cir. 1977).

Most importantly, respondent Rathbun presented evidence at trial to support her Title VII claims. As the Court of Appeals noted, "...neither did

the basis for her case rest entirely on her own testimony." (App.16). On this record, the Court of Appeals was clearly correct in concluding that respondent Rathbun did not act in "bad faith" in prosecuting this action and that the district judge abused his discretion by holding otherwise.

IV. THE COURT BELOW PROPERLY APPLIED THE OBJECTIVE TEST OF NON-FRIVOLOUSNESS ADOPTED IN CHRISTIANSBURG GARMENT CO. v. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Petitioner Board Members argue that the United States Court of Appeals for the Sixth Circuit misapplied this Court's standard for awarding attorney fees against a Title VII plaintiff as set forth in Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412 (1978) by relying on respondent Rathbun's subjective mental state rather than an objective analysis of whether her case "was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." Id. at 421. Petitioners' argument is both implausible and based on a rather tortured misreading of the opinion of the Court of Appeals.

A proper reading of

the Court of Appeals' opinion in this case demonstrates that the objective test mandated by Christiansburg Garment Co., supra, was applied and applied correctly. The Court of Appeals quoted the operative language of Christiansburg Garment Co. (App. 14, 19). Immediately after doing so the Court of Appeals held that "this standard does not support an award of attorney fees against Rathbun." (App. 14). The Court below did not rest on the subjective belief of respondent Rathbun but instead explicitly found that "[s]he had some foundation for believing that she had been discriminated against" (App. 19) and "certainly had a sufficient basis for continuing her claims...." (App. 20). (emphasis added).

Simply stated, respondent Rathbun's Title VII case was not "frivolous, unreasonable, or without foundation."

Christiansburg Garment Co., supra at 421. The fee sanction imposed by the trial judge was a clear abuse of discretion and the Court of Appeals so held. (App. 14, 20). The trial judge failed to even "consider the fact that the OCRC had issued a probable cause finding against the school board...." (App. 16). The Sixth Circuit followed every other circuit in finding that an administrative finding of probable cause "lends support" to the conclusion that a Title VII action is not frivolous. (App. 17). See, e.g., Mitchell v. Office of Los Angeles County Sup't. of Schools, 805 F.2d 844 (9th Cir. 1986); Badillo v. Central Steel & Wire Co., 717 F.2d 1160 (7th Cir. 1983); EEOC v. Freuhauf Corp., 609 F.2d 434 (10th Cir. 1979). The Court of Appeals correctly found that the fact that two

Motions to Dismiss and two Motions for Summary Judgment filed by defendants were denied was a further indication of non-frivolousness. (App. 22-23). This relevant fact simply was ignored by the trial judge. The trial judge also ignored the fact that four attorneys and a law professor found her case meritorious, certainly a relevant consideration on the issue of alleged frivolousness. (App. 19-20). The trial judge erroneously found that there was no evidence to support respondent Rathbun's Title VII action. In contrast, the Court of Appeals held that there was some evidence to support her claims and "neither did the basis for her case rest entirely on her own testimony." (App. 16).

The trial judge found that no briefs were filed on the attorney fee sanction issue when in fact the opposite was true.

(App. 15). This lack of awareness of the briefs filed on behalf of respondent Rathbun perhaps explains the trial judge's numerous errors of fact and law. Finally, the fact that the trial judge never suggested that the action was frivolous in his original Findings of Fact and Conclusions of Law (App. 4n.2) strongly suggests that his decision was impermissibly based on hindsight and the mere fact that respondent Rathbun's lawsuit was ultimately unsuccessful. See, e.g., Hughes v. Rowe, 449 U.S. 5, 14 (1980); Christiansburg Garment Co., supra at 421-22.

The argument of petitioner Board Members that all of these considerations apply only to petitioner Board of Education is both factually and legally erroneous. In fact. there was evidence inculpating the petitioner Board Members

presented at the trial. (App. 16) More importantly the evidence presented at trial and the OCRC probable cause finding against petitioner Board of Education was applicable to petitioner Board Members as a matter of established law. Petitioner Board Members were sued only in their official, representative capacities. (App. 4, 16n.6) In such a case the lawsuit was "not a suit against the official[s] personally, for the real party in interest is the entity." Kentucky v. Graham, 473 U.S. 159, 167 n.14 (1985) (emphasis in original). See also, Monell v. New York City Dep't of Social Services, 436 U.S. 658, 690 n.55 (1978). Since the petitioner Board Members were sued only in their official capacities no evidence against them in their personal capacities was necessary or appropriate.

CONCLUSION

Respondent respectfully submits that this case presents no issue worthy of review by this Court and that the petitions for writs of certiorari should be denied.

Respectfully submitted,

LIBERT PINTO, Esq.
Suite 2222
The Illuminating Building
55 Public Square
Cleveland, OH 44113
Counsel for Respondent Rathbun